

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

JOHN DOE,)	
)	
Plaintiff,)	
)	
v.)	Case No. 7:21cv378
)	
VIRGINIA POLYTECHNIC INSTITUTE)	
AND STATE UNIVERSITY, et al.,)	
)	
Defendants.)	

**DEFENDANTS' RESPONSE IN OPPOSITION
TO PLAINTIFF'S MOTION TO CONSIDER ADDITIONAL EVIDENCE**

Defendants Virginia Polytechnic Institute and State University ("Virginia Tech"), Timothy Sands ("Sands"), and Tamara Cherry-Clarke ("Cherry-Clarke") (collectively "Defendants"), by counsel, object and respond in opposition to Plaintiff's Motion to Consider Additional Evidence. For the foregoing reasons, plaintiff's motion should be denied.

1. Defendants timely responded in accordance with the Magistrate Judge's Order granting in part plaintiff's Motion to Compel. ECF No. 148-1. It is plaintiff's own fault that he waited so long to seek an Order overruling Defendants' discovery objections. See ECF No. 132.
2. Plaintiff waited thirteen (13) days after receiving Defendants' supplemental discovery responses to ask the Court to consider the additional evidence he has submitted. Plaintiff offers no explanation as to why it took so long to review such a small number of documents or to ask the court for the opportunity to submit a

surreply. Regardless of the lack of any explanation for the delay, such a delay is untimely.

3. Plaintiff cites no authority supporting his request for the Court to consider his recent filing.¹
4. Further, plaintiff has not presented the “additional evidence” in a format that is permissible under Rule 56 of the Federal Rules of Civil Procedure. In order to support or oppose a material fact, a litigant must cite to material that can be “presented in a form that would be admissible in evidence.” Fed. R. Civ. P. 56(c)(2).
5. Plaintiff did not identify a records custodian from Virginia Tech in his Rule 26(a)(3) pretrial disclosures, and he does not contend that any of the witnesses that he did identify can authenticate or lay a foundation for any of the additional evidence to be entered into evidence.
6. Thus, the material cannot be considered for purposes of plaintiff’s opposition to Defendants’ Motion for Summary Judgment, and Defendants object to its consideration by the Court.
7. Finally, plaintiff’s attorney’s unsubstantiated characterizations of the documents in his filing are not evidence and should not be considered by the Court. See ECF No. 148, *2 (“None of the letters appear to indicate . . .”; “The remaining 34 pages appear to be . . .”; “. . . there appear to be references to . . .”; “The document . . . do not appear to identify . . .”). Plaintiff does not cite to any evidence in the record establishing

¹ “Generally, courts allow a party to file a sur-reply only when fairness dictates based on new arguments raised in the previous reply.” Vandelinde v. Priority Auto. Roanoke, Inc., No. 7:20cv330, 2021 WL 1113635, 2021 U.S. Dist. LEXIS 53820, *16 (W.D. Va. Mar. 23, 2021) (internal quotations and citation omitted).

what he claims the documents do or do not show. Rather, he relies on his own interpretations of the documents, which is improper under the Rules of Evidence.

8. Accordingly, for the foregoing reasons, Defendants respectfully request entry of an Order denying plaintiff's Motion to Consider Additional Evidence.

Respectfully submitted,

VIRGINIA POLYTECHNIC INSTITUTE AND
STATE UNIVERSITY, TIMOTHY SANDS and
TAMARA CHERRY-CLARKE

/s/
Katherine C. Londos (VSB #: 36848)
Nathan H. Schnetzler (VSB #: 86437)
FRITH ANDERSON + PEAKE, P.C.
29 Franklin Road, SW
P.O. Box 1240
Roanoke, Virginia 24006-1240
Phone: 540/772-4600
Fax: 540/772-9167
Email: klondos@faplawfirm.com
nschnetzler@faplawfirm.com

Kay Heidbreder (VSB No.: 22288)
University Legal Counsel and
Senior Assistant Attorney General
heidbred@vt.edu
M. Hudson McClanahan (VSB No.: 46363)
hud3@vt.edu
Kristina J. Hartman (VSB No.: 92279)
kjhart06@vt.edu
Stephen F. Capaldo (VSB No.: 74045)
scapaldo@vt.edu
Associate University Legal Counsel and
Assistant Attorney General
University Legal Counsel (0121)
Burruss Hall, Suite 236, Virginia Tech
800 Drillfield Drive
Blacksburg, VA 24060
Phone: (540) 231-6293
Fax: (540) 231-6474
Counsel for Defendants



CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will automatically send notification of such filing to all counsel of record.

/s/ Nathan H. Schnetzler
Of Counsel

